

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 24-208

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ROBERT CLARK, *ET AL.*,

Petitioners,

v.

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**

Respondent.

Certified Questions from the Circuit Court of Kanawha County, West Virginia

PETITIONERS' CERTIFIED QUESTION REPLY BRIEF

Lonnie C. Simmons (WVSB 3406)
DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC
P.O. Box 1631
Charleston, West Virginia 25362-1631
Telephone: (304) 342-0133
Facsimile: (304) 342-4605
Email: lonnie.simmons@dbdlawfirm.com

Counsel for Petitioners

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I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

The parties in this case do not have any major dispute on the relevant facts because, for the most part, the issues presented by the certified questions are questions of law. Thus, this reply brief will focus on the arguments made by Respondent West Virginia Consolidated Public Retirement Board.

II. Reply to arguments asserted by Respondent

A. The Court should use its discretion to accept this case

While the parties in this litigation disagree over the full meaning and impact of this Court's holdings in *West Virginia Consolidated Public Retirement Board v. Clark*, 245 W.Va. 510, 859 S.E.2d 453 (2021), the parties do agree that resolving this dispute through the certified question

process makes sense in this case. In its brief, Respondent does not make any argument that this Court should use its discretion to reject this case, presumably because Respondent disagrees with the trial court's answers to the questions posed.

Petitioners, who are retired and active law enforcement officers employed by the West Virginia Division of Natural Resources (DNR), respectfully ask this Court to use its discretion under Rule 17 of the Rules of Appellate Procedure to accept this case and to address the substance of the issues raised. Although the trial court gave answers that favored the arguments presented by Petitioners, Petitioners nevertheless recognize that for judicial efficiency, the quickest way to obtain a final ruling in this litigation that has been ongoing for close to a decade is for this Court to issue the final word.

B. Respondent violated its fiduciary duties owed to Petitioners

The two certified questions answered by the trial court clearly identify both issues still being litigated. However, instead of accepting the questions as written, Respondent suggests replacing the first certified question¹ with three separate questions. While Petitioners generally have no objection to having the certified questions rewritten, if the Court deems that is appropriate, Respondent's suggested modifications are confusing and completely ignore the significance of this Court's finding that Respondent violated the fiduciary duties it owed to Petitioners.

Fundamentally, the first certified question addressed by the trial court is whether this Court's holdings in *Clark* addressing the pension rights of Petitioners under the Public Employees Retirement System (PERS) apply to the retired **and the active DNR law enforcement officers**.

¹Respondent did not suggest any change in the second certified question addressed by the trial court.

Four members of the Court concluded that the statutory severance pay earned by Petitioners should not have been included in calculating Petitioners' compensable income for retirement purposes. Thus, Respondent overpaid pension benefits to the retired Petitioners because the subsistence pay they earned should not have been included in determining their pension benefits. Similarly, the active Petitioners and their employer overpaid contributions into PERS based in part on the subsistence pay Petitioners earned.

Despite the fact that both the retired and active Petitioners were impacted by this same error, Respondent believes these two groups of officers—retired and active--ought to be treated **differently**. In *Clark*, the Court held Respondent cannot change the benefits received by the retired Petitioners, which were calculated by including the subsistence pay they earned. However, Respondent does not believe this same holding should be applied to the active Petitioners who were employed by the DNR as of the date of this Court's mandate order. Under Respondent's theory, the subsistence pay earned by these active Petitioners must be **excluded** from the calculation of their compensable income under PERS, which naturally will reduce their pension benefits. If the Court actually meant to discriminate between these two groups as suggested by Respondent, then this case will provide the Court with the opportunity to explain the rationale for such a confusing, unjustifiable, unfair, and inconsistent result.

Under the facts developed in this litigation, Respondent is required to comply not only with the mandates of the applicable error correction statutes, but also and more importantly, Respondent must exercise the highest fiduciary duties with respect to Petitioners and all members of the various retirement systems managed by Respondent. While the error correction statute applicable to Respondent's overpayment of retirement benefits, W.Va.Code §5-10-44(e), and the error correction

statute applicable where employees make overpayments into PERS, W.Va.Code §5-10-44(d), require Respondent to correct errors, in both instances, Respondent has a fiduciary duty to correct all errors in a timely fashion.

In *Clark*, the Court held that the 2015 version of W.Va.Code §5-10-44(e), addresses how Respondent is able to correct errors where retirement benefits were overpaid to retired employees. Specifically, subdivision (e) authorizes Respondent to correct pension overpayment errors in a timely manner² and can require the retired employee to repay the amount of the overpayment. Thus, ordinarily, this statute authorizes Respondent to require a retired member to pay back into the system any overpayments received by such member.

However, under the facts of this case, this Court concluded that Respondent had violated its statutory **and** fiduciary obligations owed to these particular Petitioners. Specifically, this Court held in *Clark*, 245 W.Va. at 521, 859 S.E.2d at 464:

We have described PERS as both a statute and a trust. “The ‘body corporate’ of [PERS] constitutes a trust. The terms of the trust contract are spelled out in the PERS statute. W.Va. Code § 5–10–1 *et seq.* **The Board manages and administers PERS, and the Trustees have “the highest fiduciary duty to maintain the terms of the trust, as spelled out in the [PERS] statute.” “The PERS Board, as trustee of retirement funds, must dispose of them according to the law. The board has a fiduciary duty to protect the fund and the interests of all beneficiaries thereof, and it must exercise due care, diligence, and skill in administering the trust.** (Emphasis added).

²As explained in footnote 2 of Petitioners’ initial brief, in 2022, the Legislature amended this statute by omitting the language “in a timely manner” and replaced it with “upon learning of the error.” This statutory change has no impact on the Court’s ultimate holding that Respondent violated the fiduciary duties owed to Petitioners.

The highest fiduciary duties owed by Respondent to the members of the various retirement systems it manages requires more than simply complying with statutes. It would be impossible for the Legislature to micromanage every decision, investment, communication, or decision made by Respondent. Rather than following such an approach, the Legislature accomplished its purposes by delegating to Respondent the highest fiduciary duties to protect the funds and assets of its retirees, as noted in Syllabus Point 3 of *West Virginia Investment Management Board v. Variable Annuity Life Insurance Co.*, 234 W.Va. 469, 766 S.E.2d 416 (2014):

“The fiduciary duty of the Consolidated Public Retirement Board established by *W.Va.Code*, 5–10D–1 [1998] and its members, with respect to the public employee pension funds and assets entrusted to the Board, includes the affirmative duty to monitor and evaluate the effect of legislative actions that may affect such funds and assets, and to take all necessary actions including initiating court proceedings if necessary to protect the fiscal and actuarial solvency of such funds and assets.” Syl. Pt. 2, *State ex rel. Deputy Sheriff’s Ass’n v. Sims*, 204 W.Va. 442, 513 S.E.2d 669 (1998).

In *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988), the Court recognized the constitutional and contractual right State public employees are owed in connection with their retirement plans and, as a result, such already accrued retirement benefits cannot be reduced. These constitutional and contractual obligations owed by Respondent were recognized based upon a review of the applicable statutes and constitutional provisions, as opposed to being based upon a specific statute. Thus, in addition to its statutory obligations, Respondent also owes the highest fiduciary duties to the members of the retirement systems.

In footnote 7 of Respondent’s brief, an example of the income data received by Respondent from the DNR is included showing the income received by some of Petitioners. Respondent asserts

there is no way of determining from the data presented whether or not the listed income included the severance pay earned by these Petitioners. Petitioners strongly disagree with this assertion.

Respondent knew or should have known that in 1996, the Legislature enacted W.Va.Code §20-7-1, mandating that Petitioners earn subsistence pay every month. If Respondent had noted this statute the first time one of its employees assisted a DNR law enforcement officer seeking to retire say in 1997, Respondent logically would have investigated whether this subsistence pay had been included in the calculation of the officer's compensable income. Just one phone call to the DNR would have resolved this issue.

However, nothing like that occurred and in *Clark*, 245 W.Va. at 525, 859 S.E.2d at 468, the Court was very critical of Respondent's failure to discover this fact:

We are astonished that the Board did not recognize this error at any time between March 1997 and April 2014. At that time, while preparing a benefit estimate for Mr. Cogar, the Board "audited his file, and noticed several months of atypical salary history," according to the joint stipulation of facts. But, officers had retired between 1997 and 2014, presenting the Board with opportunities to notice the same atypicality earlier. Even more concerning, the Board offers no explanation why it audited that particular file at that particular time, so we are left to conclude that the Board uncovered the error by happenstance. (Emphasis added).

After concluding Respondent had violated its statutory and fiduciary obligations owed to Petitioners, the Court concluded Respondent was prohibited from attempting to use its statutory authority under W.Va.Code §5-10-44(e), to obtain any repayments from the retired Petitioners, 245 W.Va. at 526, 859 S.E.2d at 469:

In sum, the Board has failed to act in a timely manner to correct system overpayments that resulted from the erroneous treatment of subsistence allowance payments as pensionable compensation. **Consequently, the Board may not require**

Respondents who have received overpayments from PERS due to that error to repay those amounts. For the same reason—a lack of timeliness, as that term is found in § 5-10-44(e)—the Board may not prospectively adjust payments to those retirant- and beneficiary- Respondents to whom annuity payments have already started. (Emphasis added).

Obviously, if Respondent had discovered in 1997, that the DNR had included the subsistence pay as part of Petitioners’ compensable income, then the error would have been noted at that time, the DNR would have been notified, and the active Petitioners and the DNR would have stopped paying contributions into PERS including this subsistence pay. Thus, Respondent’s violation of its fiduciary duties impacted the retired and active Petitioners.

Although Respondent suggests there is no real question regarding this Court’s holdings in *Clark*, in reality, the decision in *Clark* has no detailed discussion regarding how Respondent’s failure to uphold its “fiduciary duty to protect the fund and the interests of all beneficiaries thereof” and failure to “exercise due care, diligence, and skill in administering the trust” impacts the rights of Petitioners actively employed at the time of this Court’s mandate order. The first certified question answered by the trial court concludes this Court intended to treat the retired and active Petitioners the same by allowing both groups to include subsistence pay in the calculation of their compensable income under PERS.

Respondent asserts that it is “duty-bound and statutorily required to refund those overpayments under subsection (c) and (d) of §5-10-44.” (**RESPONDENT’S BRIEF** at 5). Once again, this argument ignores the finding by this Court that Respondent violated the fiduciary duties owed to the retired and active Petitioners. Although Respondent has the authority under W.Va.Code §5-10-44(e), to demand retired employees to return overpaid benefits they received, the

Court held this statutory authority could not be used based upon Respondent's violation of its fiduciary duties to discover this error earlier. This same holding should be applied to the active Petitioners. To hold otherwise would require this Court to recognize the significance of Respondent's violation of its fiduciary duties owed to the retired Petitioners, but to ignore this same violation with respect to the active Petitioners. Petitioners respectfully submit the trial court correctly answered the first certified question because there is no legal or logical rationale for discriminating against these two groups of employees in the way Respondent has asserted.

C. The Court should reject the possible loss of tax treatment assertion

In litigation involving state employee retirement benefits, Respondent often raises the specter that a decision by this Court contrary to Respondent's position risks jeopardizing the tax treatment of the various retirement plans by the Internal Revenue Service. For example, in its brief at 7, Respondent claims that a ruling in favor of Petitioner's position "could significantly undermine the ability of the CPRB to properly administer PERS and other plans." Similarly, in its third proposed certified question, Respondent indirectly questions the ruling the Court made in *Clark* with respect to the retired Petitioners by asking, "CPRB requests direction on how CPRB can accomplish including subsistence allowance, which is not compensation under PERS, in retirement contributions for the active officers on an ongoing basis while continuing to maintain the PERS plan's tax-deferred status with the Internal Revenue Service?"

The Court already held that the subsistence pay earned by all retired Petitioners as of the date of the mandate order must be included in the calculation of their compensable income in determining their pension benefits. This holding, which is not disputed by the parties, resulted from Respondent's failure to determine much earlier that the subsistence pay should not have been

included in calculating Petitioners' compensable income. There are consequences when Petitioner fails to carry out the highest fiduciary duties it owes to the members of its various retirement plans. In this case, the remedy was to continue paying the retired Petitioners the same pension benefits they had earned and had been paid, with the subsistence pay they earned included in the pension calculation. There is no evidence in the record of this case that this Court singlehandedly destroyed the tax-deferred status of PERS as a result of this holding in *Clark*. Accordingly, the Court should not hesitate to provide the same remedy for the active Petitioners as a result of Respondent's fiduciary violations.

Respondent attempts to excuse its actions by asserting at page 7 of its brief that "errors are inevitable in PERS with more than 700 participating employers throughout the state and over 63,000 members." There was nothing "inevitable" about the error committed by Respondent in this case. The fact that Petitioners received subsistence pay on a monthly basis starting in 1996, was not a State secret, but rather was mandated by the Legislature in a statute. As the Court noted, it is astonishing that Respondent did not investigate and discover that from 1996 to some time in 2014, the DNR had included subsistence pay in reporting Petitioners' income to Respondent. *Clark*, 245 W.Va. at 525, 859 S.E.2d at 468. If Respondent needs more employees or funds to administer these retirement programs to reduce all of these "inevitable" errors, Respondent needs to express these concerns to the Legislature.

Respondent's solution every time it makes an error or violates its fiduciary duties is to punish the innocent State employee in some way. However, as this Court has held repeatedly, Respondent owes the highest fiduciary duties to protect the fund and the interests of all beneficiaries thereof and to exercise due care, diligence, and skill in administering the trust. When Respondent violates its

duties, the innocent State employee should not be the one to pay the price for Respondent's wrongdoing.

D. Case law and public policy supports awarding attorneys' fees

The parties have fully briefed the attorneys' fees question and have discussed the relevant case law. Petitioners also have identified for the Court other State employee retirement cases where Respondent paid attorneys' fees for the successful State employee litigant. Furthermore, public policy supports awarding attorneys' fees in these cases, which are always complicated and can take multiple years to resolve.

Imagine you are a State employee ready to retire or already retired and you receive a devastating letter from Respondent denying or reducing retirement benefits. The morass of technical statutes and regulations is overwhelming. More often than not, State employees simply accept the letter and take no action to challenge Respondent. These employees desperately need legal assistance, but it appears, for the most part, present counsel is one of the very few lawyers willing to accept these cases. Ideally, a ruling by this Court recognizing that an award of attorneys' fees may be available in these cases would help level the playing field for State employees, who often may have a winning position, but they may not know it.

In its brief, Respondent comments that the Court already decided the attorneys' fees issue by including in the mandate order the standard language "that the parties shall each bear their own costs." Respondent's assertion ignores the **AGREED ORDER** entered on May 4, 2020, where the trial court retained jurisdiction over the issue of whether Petitioners were entitled to an award of attorneys' fees. Thus, Petitioners and Respondent agreed to hold back on resolving this issue so that this Court could resolve the substantive issues raised in this litigation. Because this issue was held

back by agreement of the parties, the language in this Court's mandate order does not in any way address the merits of Petitioners' request for attorneys' fees.

Respondent references the identification of the legal issues being litigated by attaching one page of **PETITIONERS' INITIAL APPEAL BRIEF** filed many years ago with the trial court. The argument is that because this Court held that the subsistence pay earned by Petitioners should not have been included in the calculation of their compensable income, Petitioners have not prevailed. This argument ignores the fact that this Court in *Clark* actually requires Respondent to continue including the subsistence pay earned by Petitioners who were retired by the date of the mandate order. If not for this Court's holding in *Clark*, Respondent was all set to use its authority under W.Va.Code §5-10-44(e), not only to demand retired employees to return overpaid benefits they received, but also to reduce their future benefits accordingly. Clearly, as to the retired DNR officers, Petitioners prevailed in protecting their pension rights. Because the decision was not clear on how this holding applies to the active Petitioners, the parties sought to have this Court resolve this dispute through the present certified question process.

The 2009 *Shackleford* circuit court order attached to Respondent's brief, where the request for attorneys' fees was denied, simply demonstrates the problem posed in these retirement cases. In *Shackleford*, the employee was forced to litigate his disability retirement before he was able to prevail. For some reason, the circuit court judge in the case did not believe that the facts or the case law cited therein justified an award of attorneys' fees for this successful petitioner, who had to litigate the matter against Respondent to force Respondent to comply with the law. Placing the burden on this petitioner to pay his attorneys' fees when Respondent initially had denied his disability retirement status is contrary to public policy and common sense. Nevertheless,

Shackleford is distinguishable from the facts in the present case, where this Court already determined that Respondent violated the fiduciary duties owed to Petitioners.

III. Conclusion

For all of the foregoing reasons, and for the reasons asserted in the initial brief, Petitioners who are retired and active law enforcement officers employed by the West Virginia Division of Natural Resources (DNR), respectfully ask the Court to exercise its discretion to accept the certified questions posed by the Circuit Court of Kanawha County, to allow oral argument, and issue a signed opinion answering both certified questions in the affirmative.

**PETITIONERS (ALL ACTIVE AND RETIRED DNR LAW
ENFORCEMENT OFFICERS, INCLUDING WIDOWS AND
WIDOWERS),**

–By Counsel–

/s/ Lonnie C. Simmons

Lonnie C. Simmons (WVSB 3406)

DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC

P.O. Box 1631

Charleston, West Virginia 25362-1631

Telephone: (304) 342-0133

Facsimile: (304) 342-4605

Email: lonnie.simmons@dbdlawfirm.com

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CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that on August 16, 2024, a copy of the foregoing **PETITIONERS' CERTIFIED QUESTION REPLY BRIEF** was electronically filed on all counsel of record using the File & Serve Xpress system.

/s/ Lonnie C. Simmons

Lonnie C. Simmons (W.Va.I.D. No. 3406)